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No. 82-

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JERRY LAIN BEHELER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are Miranda warnings required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, voluntarily comes to the police station, and is allowed to leave without hindrance after a brief taped interview?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTION	2-3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
A. Proceeding in the State Court	4-5,6
B. Statement of the Facts	6,7-10
ARGUMENT:	
THE WARNINGS REQUIRED BY MIRANDA V. ARIZONA DO NOT APPLY TO EVERY ENCOUNTER BETWEEN THE POLICE AND A SUSPECT; WHEN RESPONDENT, UNDER NO OFFICIAL COMPULSION WHATSOEVER, CHOSE TO SPEAK WITH SHERIFF'S OFFICERS, HIS VOLUNTARY DECISION DID NOT RAISE ANY ISSUE UNDER THE FIFTH AMENDMENT, AND MIRANDA WARNINGS WERE NOT REQUIRED	11
CONCLUSION	34

TABLE OF AUTHORITIES

	Pages
Beckwith v. United States (1976) 425 U.S. pp. 346-347	14
Fare v. Michael C. (1978) 439 U.S. 1310, 1314 (Rehnquist J., Circuit Justice	13, 24
Fare v. Michael C. (1979) 442 U.S. 707, 718	24
Haynes v. Washington (1963) 373 U.S. 503, 513-514	22
Jenkins v. Anderson (1980) 447 U.S. 231, 244 (Stevens, J., Conc.)	16
Miranda v. Arizona (1966) 384 U.S. 436	Passim
Oregon v. Mathiason (1977) 429 U.S. 492, 495	15, 16, 19, 20, 21, 28, 32, 33
People v. Herdan (1974) 42 Cal.App.3d 300, 306-307	17
People v. P. (N.Y.App. 1967) 286 N.Y.S.2d 225, 230	28, 29
Rhode Island v. Innis (1980) 446 U.S. 291, 298	15, 28, 29

	Pages
United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473	14, 28
United States v. Jimenez (7th Cir. 1979) 602 F.2d 139, 145, fn. 7	28
United States v. Washington (1977) 431 U.S. 181, 197, fn. 5	14, 16

STATUTES, CODES AND OTHER AUTHORITIES

California Penal Code	
§ 187	5
§ 190.2(a)(17)(i)	5
§ 211	5
§ 664	5
§ 12022(a)	5
California Rules of Court	
Rule 24(a)	2
Rule 28	2
28 United States Code	
§ 1257(3)	3
United States Constitution	
Fifth Amendment	4, 15, 16
Fourteenth Amendment	4

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OPINION BELOW

The Opinion of the California Court of Appeal, Fifth Appellate District, an unpublished 1982 decision numbered 5 Crim. 5136, appears as Appendix "A" to this Petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on December 16, 1982, and modified January 12, 1983. The Court of Appeal denied respondent's petition for rehearing on January 12, 1982 (Appendix "A," Modification). The decision became final as to that court on February 11, 1983 (Rules 24(a) and 28, California Rules of Court). The California Supreme Court denied the People's petition for hearing on February 10, 1983 (Appendix "B"). On February 15, 1983, the state district court stayed the issuance of the remittitur through March 2, 1983 (Appendix "C"). The remittitur issued on March 2, 1983 (Appendix "D").

This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution,

Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Beheler was convicted by jury in the Superior Court of the State of California, in and for the County of Tulare, of crimes in two counts: first degree murder with one special circumstance (killing in the attempted commission of an enumerated felony) and attempted robbery. The jury found a

principal was armed with a firearm in the commission of both offenses (Cal. Pen. Code, §§ 187, 190.2(a)(17)(i), 211, 664, and 12022(a)). (CT 141, 203-205.)

Upon conviction, respondent Beheler was sentenced to life imprisonment without possibility of parole with a two-year concurrent sentence for attempted robbery and a one-year enhancement for the firearm use. (CT 208, 209-211.)

The Court of Appeal of the State of California, Fifth Appellate District, by unpublished decision filed December 16, 1982, and modified January 12, 1983, reversed respondent's judgment of conviction on all counts. The State Court held respondent was not properly advised of his constitutional rights pursuant to Miranda v. Arizona (1966) 384 U.S. 436 prior to a taped interview in which he confessed his involvement in the crime under investigation (Appendix "A").

The People's petition for rehearing was denied on January 12, 1983, when the court modified the opinion (Appendix "A," Modification). Although three judges voted in favor of granting a hearing, the California Supreme Court denied hearing on February 10, 1983 (Appendix "B").

B. Statement of Facts

During the late evening hours of February 20, 1980, Peggy Dean - a pseudo drug dealer - was shot to death in the parking lot of the Palms Liquor Store in Bakersfield, California.

A few hours after Dean was killed, respondent had his next-door neighbor contact the Kern County Sheriff's Office (RT 86-87; ART 10). When Deputy Lantz first arrived, respondent wanted to discuss "the circumstances surrounding the shooting" (ART 4-5, 11).

As the conversation continued, respondent admitted being present when Dean was shot. He said Daniel (Dee Dee) Chavez, Roscoe (Rocky) Howard, Jr., and Daniel Wilbanks (respondent's half brother) were also in the car (RT 88, 92). Danny Wilbanks fired the fatal shot. Respondent said Wilbanks shot Ms. Dean for "no apparent reason" (RT 88; ART 5, 11).

Respondent said the gun used in the shooting - a. 357 magnum - was somewhere in his backyard. The car used to transport them to and from the scene was parked next to the house. He gave officers permission to search his car and the yard area (RT 89-90; ART 5, 13).

A senior officer asked Deputy Lantz to take Beheler to the sheriff's office for more interviews. Lantz explained this to respondent, asked if he had any objection to going to the sheriff's office, and

specifically told him he was not under arrest. Respondent agreed to go. He said he wanted to bring the investigation to a conclusion as soon as possible (RT 91; ART 6).

Without being advised of his rights, respondent was interviewed at the sheriff's office in the homicide detail interview room (RT 109; ART 16). He was not restrained, and, initially, he was not even regarded as a suspect. The first interview lasted from 2:23 a.m. to 2:36 a.m. Respondent left the interview room. The interviewer called him back for another brief series of questions. The second interview concluded at 2:53 a.m. The entire episode consumed no more than 30 minutes. The officer advised respondent his statement would be evaluated by the district attorney. Respondent was permitted to return to his residence (RT 109-111; ART 16-17, 18).

Five days later, on February 26, 1980, respondent was arrested. He was advised of and waived his Miranda rights and gave a second detailed, taped confession (ART 18-19, 20). During that interview the following exchange occurred (CT 22):

> "Q. Jerry, this is my second interview with you.
>
> "A. Yes sir.
>
> "Q. The other interview as taken, uh, early morning hours of 2-21-80. And that interview was as a result of a call you made to the Sheriff's Office with the information, uh, as to who had killed the girl at Palm Liquor Store.
>
> "A. Yes sir.
>
> "Q. We responded to your address at that time. You were extremely cooperative, you gave us permission to search your car, your residence, the yard.
>
> "A. Yes sir.
>
> "Q. And then you voluntarily came down to the Sheriff's Office and gave a statement I believe regarding the offense.
>
> "A. Yes sir."

The trial court concluded the Miranda warnings were not required prior to the first statement. Both statements were admitted at trial (ART 27).

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ARGUMENT

THE WARNINGS REQUIRED BY MIRANDA V. ARIZONA DO NOT APPLY TO EVERY ENCOUNTER BETWEEN THE POLICE AND A SUSPECT; WHEN RESPONDENT, UNDER NO OFFICIAL COMPULSION WHATSOEVER, CHOSE TO SPEAK WITH SHERIFF'S OFFICERS, HIS VOLUNTARY DECISION DID NOT RAISE ANY ISSUE UNDER THE FIFTH AMENDMENT, AND MIRANDA WARNINGS WERE NOT REQUIRED

Relying on this Court's opinion in Miranda v. Arizona (1966) 384 U.S. 436, the California Court of Appeal has erroneously concluded respondent should have been advised of his Miranda rights before the interview with police authorities on February 21, 1980. The key holding of the Fifth District Court of Appeal in reversing respondent's conviction was the court's conclusion that the February 21 interview constituted a "custodial interrogation."

The Court of Appeal's misinterpretation of Miranda involves substantial questions of a recurring nature relating to the Fifth and Fourteenth

Amendments, and the application of Miranda by lower courts.

The opinion is a classic example of the lower courts' relentless and unjustifiable expansion of Miranda principles. These courts are rapidly obliterating the carefully defined limits of the original decision.

The state court's decision is wrong. If it is allowed to stand, a self-confessed murderer may be freed. But, the decision has wider and more significant implications. In Miranda, this Court examined coerced confessions and concluded compulsion was the evil to be avoided. The Fifth District, on the other hand, has examined a voluntary confession and concluded confessions are the evil to be avoided.

By shifting the focus of the Miranda analysis from compulsion to police suspicion - the existence of probable cause -

the state court rips Miranda completely loose from its own doctrinal moorings (Fare v. Michael C. (1978) 439 U.S. 1310, 1314 (Rehnquist J., Circuit Justice)). In Miranda, this Court said explicitly:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." [Footnote omitted.] (Miranda v. Arizona, supra, 384 U.S. at pp. 477-478.)

The state appellate court's opinion expands Miranda far beyond its logical scope. In Miranda the focus of concern was the inherently coercive nature of an interrogation conducted by isolating the

suspect, against his will, with police officers. Thus, unless officers comply with Miranda's procedural safeguards, the suspect's statements are barred as "compelled."

> "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicion at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questions" (Beckwith v. United States (1976) 425 U.S. at pp. 346-347, quoting with approval from United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473).

All Miranda's safeguards, which are designed to eliminate coercive police tactics, rest on a scenario of overbearing compulsion caused by isolation of a suspect in police custody (United States v. Washington (1977) 431 U.S. 181, 197, fn. 5). Custodial interrogation means questioning initiated by law enforcement officers after a

person has been taken into custody or otherwise deprived of his freedom of action in any significant way (Rhode Island v. Innis (1980) 446 U.S. 291, 298). When a suspect voluntarily comes to the police station, is specifically told he is not under arrest, and is allowed to leave without hindrance after a half hour interview, he is clearly not in custody or otherwise deprived of his freedom of action in any significant way (Oregon v. Mathiason (1977) 429 U.S. 492, 495). Obviously, if a person is not in custody and acts voluntarily, Miranda warnings are not required since the element of compulsion is entirely lacking (Oregon v. Mathiason, supra, 429 U.S. at p. 495). When a citizen is under no official compulsion whatever, either to speak or to remain silent, his voluntary decision to do one or the other, does not raise any issue under the Fifth Amendment

(Jenkins v. Anderson (1980) 447 U.S. 231, 244, Stevens, J., Conc.).

The Fifth Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions by government officials (United States v. Washington, supra, 431 U.S. 181, 186). Indeed, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. (Id., at p. 187.) Absent some officially coerced self-accusation, the Fifth Amendment is not violated by even the most damning admissions (ibid).

This Court justified its admittedly expansive interpretation of the Fifth Amendment on the ground that the inherent compulsion of lengthy, incommunicado interrogation represented the kind of official coercion prohibited by the privilege against self-incrimination. It was that sort of coercive environment to which Miranda by

its terms is made applicable, and to which it is limited (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

In its opinion in this case, the state court correctly explains that the requirement of "Miranda" warnings is necessary to dispel the "coercion inherent in an environment of incommunicado-police-dominated interrogation." (Appendix "A," at p. 9.) It also correctly states that the central issue in this case is whether or not appellant was "in custody" during the initial questioning on February 21, 1980 (id., at p. 10).

However, in holding that appellant's interview on February 21 was a "custodial interrogation," the Fifth District Court relies on four factors set forth in People v. Herdan (1974) 42 Cal.App.3d 300, 306-307 (ibid). As explained in Herdan, these factors are:

> "(1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of the questioning." [Fns. omitted.]

In applying these "factors," the court found that the investigation had focused on the appellant and that the questioning was designed to elicit incriminating statements and was, therefore, an interrogation (Appendix "A," at pp. 15-17, 18-19). The court examined the indicia of arrest and found appellant was told he was not under arrest, the officers believed he was not "in custody," and appellant believed he was not "in custody" during the interview. From this, the state district court concludes "there was little indicia of arrest present" and "this factor does not balance heavily toward appellant" (Appendix "A," pp. 17-18). The opinion did not indicate whether or not the site of the interrogation, the sheriff's

office, was inherently coercive, but stated the site was not "dispositive" (id., at p. 14). The court then concluded that its analysis of these factors indicated that respondent had not proven that appellant's confession was voluntary beyond a reasonable doubt (id., at p. 20).

The appellate court's analysis and result is patently contrary to this Court's decision in Oregon v. Mathiason, supra, 429 U.S. 492. In that case, based on facts very similar to the facts in the instant case, this Court concluded the defendant was not "in custody" and did not have to be advised of his Miranda rights.

In Mathiason, a burglary suspect responded to a request that he contact the police. He agreed to talk to an investigator at the police station. When the suspect arrived, the investigator advised him he was not under arrest. They entered an office,

closed the door, and sat down across a desk from each other. The investigator explained he believed the suspect was involved in a burglary and falsely stated that his fingerprints had been found at the scene. After a few minutes, the suspect admitted his involvement in the burglary. He was advised of his Miranda rights and gave a taped confession. The officer again told him he was not under arrest. He said the district attorney would decide whether to file charges. The suspect was released and allowed to return home (Oregon v. Mathiason, supra, 429 U.S. at pp. 493-494).

The Oregon Supreme Court reversed the defendant's conviction since he had been interrogated in a "coercive environment" without being advised of his Miranda rights (id., at p. 494).

This Court disagreed. The opinion re-emphasized a fundamental principle: the

warnings required by Miranda do not apply to every encounter between the police and a suspect (Oregon v. Mathiason, supra, 429 U.S. at p. 494). Rather, the Miranda requirements are limited to interrogations occurring after a person has been taken into custody or otherwise deprived of freedom in a significant way (Oregon v. Mathiason, supra, 429 U.S. at p. 494). In the absence of a "formal arrest or restraint of any movement," other factors such as the location of the questioning, the level of suspicion, and the nature of the questioning do not trigger Miranda warnings (Oregon v. Mathiason, supra, 429 U.S. at p. 495). Thus, Miranda only applies to the "coercive environment" created when a suspect's freedom has been restricted to the point of being "in custody" (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

Mathiason reflects this Court's scrupulous regard for the precise dictates of

Miranda v. Arizona, supra, 384 U.S. 436. The latter case carved out a special exception to the constitutional test of admissibility for confessions and admission (id., at p. 457). Prior to Miranda, the court examined the "totality of the circumstances" surrounding a confession to determine if it was freely and voluntarily given without compulsion or inducement (see, e.g., Haynes v. Washington (1963) 373 U.S. 503, 513-514). In Miranda, the court held a confession resulting from "custodial interrogation" would be inadmissible unless the prosecution demonstrated the use of procedural safeguards which effectively secured the suspect's privilege against self-incrimination (Miranda v. Arizona, supra, 384 U.S. at pp. 444, 457, 478).

The court defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has

been taken into custody or otherwise deprived of his freedom of action in any significant way" (Miranda v. Arizona, supra, 384 U.S. at p. 444). Essentially, this was a situation in which suspicion had focused on a particular person to such an extent that authorities had chosen to restrain that person for further questioning (id., at p. 444, fn. 4).

The court recognized that a suspect involuntarily held, controlled, or confined in an intimidating "police-dominated atmosphere" that suggests the "invincibility of the forces of law" and "the complete subjugation of the suspect to the will of the examiner" might find it difficult to resist the prolonged pressure to confess (Miranda v. Arizona, supra, 384 U.S. at pp. 446-457). Confessions under such circumstances are inherently compelled absent evidence that the interrogators have taken "appropriate

safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." (Id., at p. 458.) The "core virtue" of the Miranda decision was its simplicity and precision in instructing the police and courts on the conduct of "custodial interrogations" (Fare v. Michael C. (1979) 442 U.S. 707, 718; Fare v. Michael C., supra, 439 U.S. 1310, 1314 (Rehnquist, J., in chambers; Miranda v. Arizona, supra, 384 U.S. at p. 468).

Mathiason meticulously confines Miranda's application to the most intense of encounters between investigators and an accused -- the interrogation of a suspect who has been involuntarily held, controlled, or confined by the authorities and whose freedom to depart is restricted in a significant way. Miranda was not meant to exclude admissions and confessions made by a suspect, such as respondent in this case, who voluntarily

appears at the police station and willingly answers police questions without being placed in custody. The police do not have to stop a person who wishes to confess to a crime (Miranda v. Arizona, supra, 384 U.S. at p. 478). Such encounters do not inherently nullify a person's will to resist or freedom of choice.

Yet, despite the similarities between Mathiason and the instant case, the lower court came to the opposite conclusion. Its analysis requires police officers to consider immaterial factors rather than simply relying on whether or not a suspect was actually in custody. The result is the exclusion of evidence voluntarily provided by the respondent when he was not subjected to the "inherent coercion" or "overwhelming compulsion" of a Miranda-type custodial interrogation.

In assessing whether respondent was in custody on February 21, the appeals court said the "focus or probable cause" factor is "no longer dispositive" but is significant and "entitled to great weight." Indeed, the state court dwells lovingly and at great length on the information officers had before interviewing appellant. While acknowledging the site of the interrogation was also not dispositive, the court expressed concern that the police did not inform respondent of the "seriousness of his position" (Appendix "A," at p. 15).

> "A reading of the record clearly indicates that appellant cooperated with the police feeling that as long as he was not the one who shot the gun he would not suffer serious criminal liability. . . . While appellant and his other cosuspects may not have been aware of the felony-murder rule, indeed, the officers in the instant case most certainly were." (Emphasis added.)

Thus, it is clear from the state court's own analysis of the record that

appellant acted voluntarily albeit possibly in ignorance of the true implications of his statement.

The state court also decided the police had sufficient cause to arrest respondent before they interviewed him on February 21. According to the state district court, the existence of probable cause is a significant factor in determining whether a suspect is "in-custody." Moreover, the court's finding that the questioning constituted an "interrogation" designed to elicit incriminating responses is based on their assessment of the information officers had before interviewing respondent (Appendix, "A," at p. 19).

However, the strength or content of the government's suspicions at the time the questioning is conducted is irrelevant for Miranda purposes (Beckwith v. United States, supra, 425 U.S. at p. 346, citing with

approval from United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473; see also United States v. Jimenez (7th Cir. 1979) 602 F.2d 139, 145, fn. 7, and cases cited therein).

Any interview with an officer who suspects the interviewee's guilt will have its "coercive aspects," but that does not trigger the Miranda requirements (Oregon v. Mathiason, supra, 349 U.S. at p. 495; People v. P. (N.Y.App. 1967) 286 N.Y.S.2d 225, 230). An "interrogation" cannot "bootstrap" the status of a suspect to that of "custody." 1/

The Miranda requirements are not to be imposed simply because "the questioned person is one whom the police suspect" (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

---

1. Rhode Island v. Innis, supra, itself states that "custody" and "interrogation" are separate concepts. Where custody is conceded, the court must determine independently whether the suspect was interrogated (id., at p. 300).

Indeed, to rely on "probable cause to arrest" in determining "custody" is contrary to the express language of the Miranda decision. [2/] In its opinion, this Court explicitly stated that by "focus of suspicion" it meant that a person had been interrogated after being "taken into custody or otherwise deprived of his freedom of action in any significant way" (Miranda v. Arizona, supra, 384 U.S. at p. 444, fn. 4). (Emphasis added.) The use of the word "significant" is not mere surplusage. (See People v. P., supra 286 N.Y.S.2d at p. 234.) To require that the Miranda warnings be given whenever an officer has probable cause to arrest, is to render the "deprivation of

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2. Rhode Island v. Innis, supra, 446 U.S. at p. 301, emphasizes that the Miranda safeguards were "designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." (Emphasis added.)

freedom" language meaningless. Just because an investigator has probable cause to arrest does not mean that a suspect is automatically being subjected to the anxieties and inherent coercion of being involuntarily held by the police. Surely, the respondent in this case, who was not restrained and never led to believe that his freedom to depart was restricted in any way, was not under such compulsion.

In short, Mathiason holds that neither "focus of suspicion" nor the nature of the questioning alone or in combination are sufficient to render a suspect "in custody," absent other evidence of "significant" restraint. As the appeals court opinion itself concedes, such other restraint was absent in this case.

The "core virtue" of Miranda - its establishment of clear, precise, and specific guidelines - is eviscerated by requiring

investigating officers to assess and weigh a variety of immaterial factors. Miranda's promise that its requirement would not "constitute an undue interference with a proper system of law enforcement" (Miranda v. Arizona, supra, 384 U.S. at p. 481) is broken. The prosecution is deprived of relevant, valuable, and constitutionally admissible evidence.

The court in this case specifically found respondent was told he was not under arrest and the officers who interviewed him did not consider him to be in custody. When respondent gave a second statement after being advised of his Miranda rights, he agreed he was not in custody during the first interview (Appendix "A," at pp. 17-18).

To summarize the salient facts: the officers did not take respondent into custody; he came to the stationhouse voluntarily; he was not arrested; he was not

restrained; he was in no way compelled to make a statement; he was permitted to leave when the interview was over. The interview lasted less than 30 minutes. Respondent's experience did not approach the level of inherent coercion evident in a true "custodial interrogation."

Under these circumstances, the facts in the instant case are even more compelling than the facts in Mathiason. "[T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way" (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

The Herdan analysis relied on by the state appeal's court does not conform to the dictates of Miranda v. Arizona, supra, 384 U.S. 436 (Oregon v. Mathiason, supra, 429 U.S. at p. 495). In fact, it is remininiscent of the "coercive environment" analysis

rejected in Mathiason. Therefore, opinions such as the one in the instant case needlessly hamper law enforcement by perpetuating an erroneous approach in determining the point at which Miranda warnings are required.

The Fifth District Court of Appeals has imposed a Miranda requirement based on factors which have nothing to do with compulsion. Appellant was never subjected to the persistent pressure of an actual custodial interrogation.

The court's decision makes Miranda admonitions obligatory in noncustodial, non-coercive contexts that do not suggest the "invincibility of the forces of the law" nor "the complete subjugation of the individual to the will of his examiner" (Miranda v. Arizona, supra, 384 U.S. at pp. 450, 457).

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Petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Fifth District Court of Appeal in the State of California.

Respectfully submitted,

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April 1, 1983

APPENDIX -- (Opinion dated December 16, 1982, 5 DCA)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JERRY LAIN BEHELER, Defendant and Appellant.	5 Crim. No. 5136 (Superior Court No. 20967) O P I N I O N

APPEAL from a judgment of the Superior Court of Kern County. John Michael Nairn, Judge. Reversed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, and Julia Cline Newcomb, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

Attorney General, Arnold O. Overoye, Assistant Attorney General, Eddie T. Keller and Janice Rogers Brown, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664, 211 and 187.)

Appellant, Jerry Lain Beheler, and codefendants were charged with violations of Penal Code sections 664, 211 (attempted robbery) and 187 (murder). As a special circumstance, it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants. Daniel Chavez,

one of the original codefendants, was granted immunity and testified against appellant.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

FACTS

On February 20, 1980, appellant, Jerry Beheler, stayed home drinking beer, talking and playing dominoes with some friends. During the day, he and his friends made alternate trips to the nearby Palm Liquor store to buy more beer. On one of these trips, appellant and a friend named Keith were approached in the parking lot of the liquor store by Peggy Dean who asked Keith if he was interested in buying hashish. Appellant testified that he refused Dean's offer as he did not have enough money. After purchasing several quart bottles of malt liquor, appellant and his friend Keith returned home to continue the domino game.

Sometime in the late afternoon, appellant, his step-brother, Danny Wilbanks, and Roscoe Howard drove to Daniel Chavez' house. Chavez and Howard were long-time neighbors and good friends. Chavez had only known appellant for a short time.

Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams.

At appellant's home, Daniel Chavez noticed that Howard had a 357 magnum pistol with him. He recognized the gun as it belonged to Howard's father. While at the house, Chavez, Howard and appellant discussed returning to the liquor store and threatening Peggy Dean with the gun to get the hash. Others testified that appellant

come up with the idea. Chavez testified that he and Howard did not want to threaten Peggy Dean with the gun. They actually discussed several plans for taking the hash. After Chavez, Howard and appellant decided they did not want to do the act, Wilbanks volunteered. Chavez said that appellant was too drunk to do it anyway. Wilbanks got the gun and started flashing it around. He took all the bullets out except one and said he only needed one. Howard told him not to be joking with the gun, took it from him and then reloaded it.

With Danny Wilbanks driving appellant's car, all four men left the house and headed for the liquor store. Chavez was in the front passenger seat. Appellant was in the rear seat behind Wilbanks. Howard sat behind Chavez. Wilbanks, with the gun on his lap, drove into the parking lot on the south side of the liquor store. Two women and a

man were sitting on the bumper poles along the south side of the store. Peggy Dean got up and walked over to the car. She said, "I didn't think you guys were going to show up." She handed Danny Wilbanks a foil-wrapped bindle the size of a marble and told him she had "twelve more in her hand." Ms. Dean leaned in the car window and observed the gun on Wilbanks' lap. She asked what the gun was for. Chavez told her it was for protection. Wilbanks pulled out the gun and pointed it at Ms. Dean and said, "Let me have it all." Ms. Dean recoiled and stepped back from the window and said to Wilbanks, "You're not going to use that on me."

Chavez and Howard urged Wilbanks to leave the place with the one bindle he had. Appellant was still sitting silently in the back seat. Despite the warning, however, Wilbanks pulled the trigger. The bullet struck Peggy Dean just above her right eye,

passed through the soft tissue of the brain and out of the back of her skull. She crumpled to the pavement and a flow of bindles spilled from her hand.

Ms. Dean's companions were still sitting on the curb posts, immobile. A pickup truck pulled into the parking lot and Chavez reached over and turned on the ignition. He told Wilbanks, "Let's get out of here." Wilbanks put the car in gear and drove off. He drove erratically--skidding and stopping--back to appellant's house.

Back at the house, they told appellant's wife about the murder. Wilbanks, while crying, repeatedly stated that he had killed Ms. Dean.

Appellant's memory of the events at the liquor store was quite limited. He remembered hearing a loud report from a gun. He lifted his head in time to catch a glimpse of a gun. Then he saw a woman slowly turn

around and fall to the ground. He did not recall the conversation in the car. He did not remember the drive home. But he did remember arriving back at the house.

Appellant told Wilbanks that he would have to leave. Chavez and Howard told everyone not to mention this to the police, "Nobody knows nobody, man." Chavez and Howard took the gun into appellant's backyard to hide it. They then took off running along the railroad tracks. Howard disposed of the bullets along the way.

Howard and Chavez first went to Chavez' house where Chavez changed his shirt. Then they went next door to Howard's house. Later, they walked to a friend's house and spent the night.

Appellant and his wife went to a neighbor's house and briefly related the story. They called the police who arrived almost immediately. Deputy Lantz, who was

investigating the scene at the Palm Liquor store parking lot, was ordered to respond to the neighbor's residence. Appellant informed him that his brother had killed the woman at the Palm Liquor store parking lot and that the gun was in his backyard somewhere. Appellant gave the officers permission to search his yard and his automobile. The gun was found in the backyard. It was hidden under some leaves and brush and wrapped in a yellow cloth.

Later in the early morning hours of February 21, appellant agreed to go to the sheriff's office for a more detailed interview. In addition, he took the sheriff's officers to the houses on Churchill Drive where Roscoe Howard and Daniel Chavez lived.

At the sheriff's department, appellant gave the investigators a detailed taped statement. The taped statement was

introduced into evidence. Appellant told the officers his half brother, Danny Wilbanks, had shot a woman in the parking lot of the Palm Liquor store. He gave the officers several details regarding the alleged incident. At one point, the taped interview concluded.

The officers then called appellant back into the interview room to ask him some more questions. The officers got appellant to reaffirm that Danny Wilbanks had a 357 magnum gun which he had gotten from Roscoe Howard. The officers asked appellant why he got the pistol from Howard at that time. Appellant responded, "it was for the purpose of robbery." Appellant admitted that the plan was to go down to the Palm Liquor store and take the "dope" away from Peggy Dean. Appellant admitted that he knew the purpose of going to the Palm Liquor store was to rob Peggy Dean of hashish. The officers asked

appellant why he went along with Wilbanks to go rob Peggy Dean. Appellant replied, "I'm his brother. I mean, if there's a way that I knew that I could have kept him from doing what he did I would have done it, if I'd have known that he was fixing to do what he had done I could have prevented it. This was just something that was unforeseen." The officers also got appellant to admit that Roscoe Howard and Daniel Chavez knew about the robbery but that "None of us had any idea that he was going to kill this lady." The officer specifically asked appellant, "But they had an idea that he was going to rob her?" Appellant replied, "Well, they knew that he was going to take her hashish." After the interview, appellant was returned to his home.

Later that day, appellant called Roscoe Howard and Daniel Chavez and convinced them to cooperate with law enforcement

officials. They also agreed to come to the sheriff's office. Their statements were tape recorded.

Several days later, the four men were arrested. Appellant, Howard and Chavez waived their Miranda rights at that time and each gave a second tape-recorded statement substantially corroborating each other.

DISCUSSION

I

Appellant contends that the admission of his tape-recorded statements constitutes reversible error because he was in custody at the time he gave those statements. [1/] He stresses that because suspicion had focused on him at the time of

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1. During the trial, a hearing was held outside the presence of the jury and the court found that the first taped statement "was voluntary and did not need to have a Miranda." Appellant's first non-Mirandized statement was thus ruled admissible as well as his second Mirandized statement made shortly after his arrest.

the first taped statement and the site of the interrogation was at the police station, he "was in custody at the time of his tape recorded interrogations." He contends that the police had probable cause to arrest him at the time of the first taped interrogation. Moreover, he argues that the length and form of questioning "clearly supports a finding of custodial interrogation." We agree.

In Miranda v. Arizona (1966) 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or

indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Moreover, as to conflicting testimony, the appellate courts

must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753; People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation' is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145

Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L.Ed.2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal.Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975) 15 Cal.3d 419, 443 [124 Cal.Rptr. 752, 541 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal.Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation;

(2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal.App.3d 300, 306-307 [116 Cal.Rptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p. 449.)" (Emphasis added.) 2/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody

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2. Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App.3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, 384 U.S. at pp. 477-478; People v. Patterson (1979) 88 Cal.App.3d 742, 747.)

is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We begin our discussion by considering the facts in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his taped statements to the sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this

is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694. . . .)"

The California Supreme court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, 66 Cal.2d 438, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The

district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions. The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that

the investigation had focused on the defendant, the officer did not intend to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill (1969) 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) However, in Hill, the defendant's initial statements to the police were not in reply to questions designed to elicit incriminating responses and in Sam, the defendant was not even a suspect during the first two conversations with the police.

The United States Supreme Court has also addressed the issue of when a suspect is

entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.) Respondent here relies heavily on this case.

In Mathiason, supra, in response to a telephone call, the defendant, a parolee, voluntarily came to the police station for questioning about a burglary. The state police had investigated a burglary and asked the lady of the house if she suspected anyone. She replied that the defendant was the only one she could think of. The officers tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call. The next afternoon, the defendant did call. The officer asked where it would be convenient to meet and the defendant had no preference. The defendant

came down to the police station and was met by an officer in the hallway who shook hands with him and took him into an office. The officer advised him that he was investigating a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The defendant admitted that he had taken the property. At this point, he was advised of his Miranda rights and the officers took a taped confession. At the end of the taped conversation, the officer told the defendant he was not arresting him at this time and that he was releasing him to go about his job and return to his family.

The United States Supreme Court held that Miranda was inapplicable because Mathiason was not "'deprived of his freedom of action in any significant way.'" (Oregon v. Mathiason, supra, 429 U.S. at p. 495.) Respondent appears to contend that Mathiason

should be read for the proposition that anytime a suspect voluntarily comes to the police station to be questioned he would automatically not be in custody for purposes of Miranda. However, upon a close reading of Mathiason, we do not believe this to be the case.

Mathiason does not indicate that the totality of the circumstances should not be considered in determining when a suspect is in custody for purposes of Miranda. Rather, the court in Mathiason looked at all of the facts and concluded that in that case defendant was not in custody per Miranda. Indeed, the facts of Mathiason are quite dissimilar to the case at bar. Unlike the defendant in Mathiason, appellant here was questioned almost immediately after the crimes had occurred. He was extremely emotionally distraught. This was undisputed. On the other hand, the defendant in Mathiason

was not interviewed until 25 days after the burglary and he was not in an emotionally distraught stage. Moreover, the officers in the instant case had a great deal of information, primarily supplied by appellant himself, that appellant was guilty of attempted robbery and first degree felony murder at the time of his interview. On the other hand, the police in Mathiason called the defendant in for questioning because the victim of the burglary, when asked if she suspected anyone, replied that the defendant was the only one she could think of. (Oregon v. Mathiason, supra, 429 U.S. at p. 493.) This is not the same kind of information linking a suspect to a crime as the police had in the instant case. Additionally, the defendant in Mathiason was a parolee and knew it was incumbent upon him to cooperate with police.

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Appellant here was interrogated in a small room at a police station. Two officers were present. As stated above, usually an interrogation at a police station is deemed inherently coercive. However, as can be seen, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the site of the interrogation factor in determining whether appellant was in custody during the February 21 interview, while relevant, in our opinion is not dispositive. Many factors may have played a part in appellant's decision to come to the police station, not the least of which is the fact that the police failed to inform him of the seriousness of his position. A reading of the record clearly indicates that appellant cooperated with the police feeling that as long as he was not the one who shot the gun he would not suffer serious criminal

liability. In addition, the police seized upon the emotion of the moment and encouraged appellant to talk. He was obviously suffering the effects of alcohol and extremely emotionally distraught. While appellant and his other cosuspects may not have been aware of the felony-murder rule,[3/] indeed, the officers in the instant case most certainly were.

(2) Whether the Investigation had Focused on the Suspect.

As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether

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3. Indeed, the prosecutor argued to the jury that appellant was ignorant of the rule.

an investigation has focused on the suspect is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21 interview, [4/] but he contends that he was entitled to have Miranda

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4. Before the officers took appellant to the police station for further questioning, Detective Lanz testified that "we stood in the yard near his doorway for some time discussing the shooting and the circumstances immediately after the shooting." Lanz informed appellant that they would prefer to interview him in depth concerning the circumstances surrounding the shooting at the sheriff's department. Lanz testified he asked appellant if he had any objection and that he explained to appellant he was not under arrest, but that going down to the sheriff's department "would merely facilitate a speedy conclusion to the interview." According to Lanz, appellant agreed to go down to the sheriff's department because "it was his desire to bring the investigation to a conclusion as soon as possible." (Emphasis added.)

warnings because there was probable cause to arrest him at the time of his interview, citing In re James M. (1977) 72 Cal.App.3d 133. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The sheriff's officers in the instant case had a substantial amount of information implicating appellant in the attempted robbery-homicide before they

conducted their first taped interview on February 21. Indeed, they knew from appellant himself that: he and the others had discussed robbing the victim at appellant's home; they drove to the liquor store to rob the victim of her hashish; Wilbanks had fired the fatal shot; the suspects had driven in appellant's car; and the gun was found hidden in appellant's backyard.

Clearly, the officers knew by the time of their first interview with appellant at his home that appellant was involved, at least as an accomplice, in the attempted robbery of Peggy Dean. Likewise, they knew full well that appellant was undoubtedly implicated in the felony murder of Peggy Dean.

From our reading of the record, it is clear that the investigation had focused on appellant, among others, before the

February 21 interview conducted at the police station, and further, the police had sufficient information to constitute probable cause to arrest appellant.

Moreover, the officers initially ended the first taped interview and then called appellant back in. At this point, they specifically interrogated him concerning his knowledge of the plan to rob Peggy Dean and his knowledge of the purpose for the gun. Appellant freely admitted his knowledge and participation in the attempted robbery and yet, even at this point in the interview, the police officers did not Mirandize appellant.

Even though the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody" issue, we conclude that on the above facts it is significant and entitled to great weight.

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(3) Whether the Indicia of Arrest Were Present.

Appellant was interviewed in an interrogation room at the sheriff's department. Two officers were present. As mentioned, supra, the officers testified he was told he was not under arrest and the officers believed that he was not "in custody" at the time of the interview. Whether the officers believed that he was in custody or not is irrelevant. Later when appellant gave his second Mirandized statement after he was arrested, he was asked if he agreed with the statement that he was not in custody during the first interview. Appellant stated that he agreed with that assessment. Appellant did not testify at the hearing and his trial counsel did not cross-examine the sheriff's officers on this point. Instead, appellant's trial counsel concentrated on the voluntariness argument

because appellant was extremely emotionally distressed and obviously under the effect, at least to some degree, of alcohol at the time of his interview.

Appellant was permitted to leave at the end of the interview. However, Detective Ray told appellant that he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether arrest would be made. From the record, we cannot tell whether he was in fact told not to leave Bakersfield.

In our opinion, there was little indicia of arrest present on the February 21 interview other than the fact that the interview took place at the sheriff's station. Thus, we conclude this factor does not balance heavily toward appellant.

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(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be deemed to be in custody pursuant to Miranda. Appellant's taped interview lasted approximately 30 minutes. Moreover, he had been extensively interviewed at home prior to the interview at the sheriff's department. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.) There is no doubt in the instant case the interrogation of appellant on February 21 was designed to produce incriminating responses. Before the officers interrogated appellant on tape they knew he was involved in the attempted robbery and/or homicide of the victim. Indeed, appellant himself had

supplied that information. It is quite apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. Appellant was asked about the plan to rob Peggy Dean. Appellant was asked about his prior contact with her. Indeed, appellant gave the officers many details regarding the incident in question. Appellant admitted that he knew Wilbanks had a gun. He admitted he knew the purpose was to rob Peggy Dean. He was specifically asked why he went along. Essentially, his response was that if he had known Wilbanks was actually going to use the gun he might have been able to prevent it. In essence, appellant confessed to felony murder.

On this record, we conclude that the form of the questioning of appellant during the February 21 taped interview was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra, 446

U.S. 291. Respondent's contention that the questions were merely "investigative in nature, not accusatorial" is totally without merit. (See People v. White, supra, 69 Cal.2d 751, 760-761.)

As we have previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595.) In the instant case, there appears to be no conflicting testimony on the Miranda issue. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude that respondent has not met its burden of establishing that appellant was not in custody during the February 21

interview. Furthermore, the incriminating statements from the February 21 interview should have been suppressed by the trial court. On the record before us, appellant essentially confessed to felony murder during the February 21 interrogation. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.) 5/

Because of our decision on the Miranda issue, we find it unnecessary to address appellant's numerous other contentions at this time. These issues are

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5. This court recently reversed the conviction of Roscoe Howard, one of appellant's original codefendants. (People v. Howard (July 16, 1982) 5 Crim. No. 5181, hg. den.) The reversal was based on an almost identical Miranda violation.

either currently pending in the California Supreme Court, or are unlikely to arise again in any subsequent retrial of appellant.

For the reasons previously stated, the judgment is reversed and remanded for a new trial.

ZENOVICH
J.

WE CONCUR:

FRANSON
Acting P.J.

QUALL
J.*

* Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JERRY LAIN BEHELER, Defendant and Appellant.	5 Crim. 5136 (Super. Ct. No. 20967) MODIFICATION OF OPINION ON DENIAL OF REHEARING

The opinion filed herein on December 16, 1982, is modified as follows:

On page 3, line 6, "Chavez testified" should be added after first full sentence and "However, appellant testified he refused the lady's offer as he did not have enough money" should be added at the end, so that the second paragraph on page 3 reads:

"Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Chavez testified appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams. However, appellant testified he refused the lady's offer as he did not have enough money."

On page 21, the sentence should be stricken and the following inserted in its place:

"The judgment is reversed and remanded for a new trial charging appellant with no offenses greater than voluntary manslaughter. (See People v. Taylor (1974) 12 Cal.3d 686.)

The petition for rehearing is denied.

ZENOVICH
j.

I CONCUR:

FRANSON
Acting P.J.

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
5th District, Division __, Crim. No. 5136

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
F I L E D
FEB 10 1983
LAURENCE P. GILL, Clerk

Deputy

PEOPLE

V.

JERRY LAIN BEHELER

Respondent's petition for hearing DENIED.

Richardson, J., Kaus, J., and Broussard, J., are of the opinion that the petition should be granted.

BIRD
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

Court of Appeal
Fifth Appellate District
F I L E D
FEB 15 1983
KEVIN A. SWANSON, Clerk
By _____ Deputy

THE PEOPLE, Plaintiff and Respondent, vs. JERRY LAIN BEHELER, Defendant and Appellant.	) 5 Crim. No. 5136)) (Super. Ct. No. 20967))))

BY THE COURT:

Upon motion of respondent, the issuance of the remittitur in the above-entitled matter will be stayed only until March 2, 1983, to allow respondent an adequate opportunity to request such a stay from the United States Supreme Court.

Dated FEB 15 1983

FRANSON Acting P.J.

I CONCUR:

ZENOVICH J.

Crim. 5136 FOOO633

IN THE Kern 20967

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT

FILED
83 MAR 7 P 1:44
GALE S. ENSTAD, Clerk
Kern County, Calif.
By P. A. McGinnis, Deputy

THE PEOPLE,
Plaintiff and
Respondent,

v.

JERRY LAIN BEHELER,
Defendant and
Appellant.

5 Crim. No. 5136
Superior Court No. 20967

REMITTITUR ENTERED [196]

APPEAL from a judgment of the Superior Court of Kern County. John Michael Nairn, Judge. Reversed.

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California, for the Fifth Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on December 16, 1982 and that this opinion or decision has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 3rd day of March, 1983.

KEVIN A. SWANSON, Clerk
By Victoria C. Hernandez,
Deputy

COPY

Office-Supreme Court, U.S.
FILED
MAY 24 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1[illegible]

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JERRY LAIN BEHELER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
A. Proceedings in the State Court	2
B. Statement of the Facts	2
ARGUMENT	
THIS IS THE WRONG CASE IN WHICH TO DECIDE THE QUESTION PRESENTED	6
A. The Facts Of This Case Disqualify It From Being Simply A Mathiason Offspring Because Mr. Beheler Was Not Informed Of His "Target Status" Under United States v. Washington, Infra	7
B. This Case Is Directly Controlled By Miranda v. Arizona, supra	10
C. Granting The Writ And Overturning The Court of Appeal's Opinion Would Result In Manifest Injustice	15
CONCLUSION	18

- - - - -

TABLE OF AUTHORITIES

	Page
Cases:	
Beck v. Alabama (1980) 447 U.S. 625	16
Culombe v. Connecticut (1961) 367 U.S. 568	13
Enmund v. Florida (1982) ____ U.S. ____	17
Escobedo v. Illinois (1964) 378 U.S. 478	12
Miranda v. Arizona (1966) 384 U.S. 436	10,12,14
Oregon v. Mathiason (1977) 429 U.S. 492	6,7,8
People v. Taylor (1974) 12 Cal.3d 686	16
Spano v. New York (1959) 360 U.S. 315	13
Townsend v. Sain (1963) 372 U.S. 293	13
United States v. Washington (1977) 431 U.S. 181	7,9,11
Constitutional Provisions:	
United States Constitution, Fifth Amendment	1
Eighth Amendment	17
Fourteenth Amendment	1

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1666

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
JERRY LAIN BEHELER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Jerry Lain Beheler, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished opinion of the Fifth District Court of Appeal in and for the State of California.

QUESTION PRESENTED

Petitioner asks this Court to decide whether "Miranda warnings [are] required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, voluntarily comes to the police station, and is allowed to leave without hindrance after a brief taped interview."

In light of the salient facts of this case, the question would be more fairly posed as follows:

Are Miranda warnings required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, is not aware of nor informed of his status as a suspect, voluntarily comes to the police station, and is allowed to leave without hindrance after a taped interrogation?

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STATEMENT OF THE CASE

A. Proceedings in the State Court

On July 23, 1980, Mr. Beheler was convicted as an aider and abettor of first degree murder (felony-murder theory) for the homicide perpetrated by Daniel Wilbanks. (CT 141.) On March 31, 1981, Mr. Wilbanks was convicted of voluntary manslaughter for the killing he perpetrated. Mr. Wilbanks received a sentence of eight (8) years in prison. (WCT 831-835.)[1/] Mr. Beheler was sentenced to serve a term of life in prison without possibility of parole.

Petitioner is incorrect in its statement of the case. Mr. Beheler was found to have been vicariously armed with the firearm used by Mr. Wilbanks. (See Petition, pp. 4-5; CT 141.) Mr. Wilbanks was found to have personally and intentionally used the weapon in the commission of the homicide. (WCT 834.)

B. Statement of the Facts[2/]

Mr. Beheler had been honorably discharged for his service to his country. And he had been continuously providing for his wife of ten years and his three daughters. He had a keen interest in meeting and getting to know his half-brother, Mr. Wilbanks. As a result, Mr. Beheler invited Mr. Wilbanks to stay with his family in Bakersfield for a few weeks until Wilbanks found work in the surrounding oil fields.

It was during this period of time that they spent a day together drinking beer and malt liquor while playing dominoes at home. By the end of the day, they were both drunk.

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1. The transcript of Mr. Wilbanks' trial has been made a part of Mr. Beheler's record on appeal. WCT refers to the Wilbanks' Clerk's Transcript.

2. Please see the complete and documented rendition of facts in respondent's Opposition to Application for Stay of Enforcement of the Judgment and the accompanying attachments (hereinafter Opposition to Stay) at pp. 4-10, incorporated by reference herein.

During repeated trips to the liquor store, they had been approached by the victim, Peggy Dean, who peddled drugs in the liquor store parking lot. It was 11:15 p.m. when Mr. Beheler and a mutual acquaintance, Rocky Howard, drove to Mr. Chavez' house. Chavez joined the group. As the immunized chief prosecution witness, Mr. Chavez explained just how drunk Mr. Beheler was. Everyone agreed he should not be permitted to attempt to drive or actively participate in stealing the purported hashish. Indeed, he was in the back seat of the car, nearly passed out, when the crime occurred.

At midnight, after drawing the gun (which belonged to Rocky Howard's father), and demanding the bindles, Mr. Wilbanks pulled the trigger, instantly killing the drug seller.

Wilbanks drove back to the Beheler house sobbing. Mr. Beheler heard the others explain to his wife what had happened. He told his half-brother he could stay there no more. Chavez and Howard hid the gun and advised everyone not to assist the police.

Mr. and Mrs. Beheler immediately called the police. (There was no delay as petitioner suggests at page 6 of the petition.) Officers arrived at the scene at midnight, and by 12:30 a.m. Deputy Lantz had been ordered to go to the Beheler house in response to his call. (ART 3.)

When the officer arrived, he found Mr. Beheler "was very upset. He was behaving as though he were almost grief stricken." (ART 8.) He was crying. In addition, "[h]e had the odor of alcoholic beverage on his breath and around him. Sometimes his speech would be moderately or mildly slurred." (ART 8.) Mr. Beheler repeatedly exhibited concern for his half-brother (AH 14), apparently unaware of potential vicarious liability for the crime. After the officers obtained consent to search forms signed by Mr. Beheler, they searched his house,

his yard and his car.

By this time they possessed probable cause to arrest Mr. Beheler. (In its independent review of the facts, the Court of Appeal so found. See also Opposition to Stay, p. 12.) However, the evidence is uncontradicted that no officer ever informed him that he was criminally liable and/or that he had a right not to incriminate himself. Instead, the state continued to investigate while affirmatively reassuring Mr. Beheler that he was not in danger of incriminating himself by telling him that he was not under arrest and that they wanted him to answer some questions in depth at the sheriff's department. Officer Lantz "asked if he had any objection to that, and explained he was not under arrest but that it would merely facilitate a speedy conclusion to the interviews." (ART 6.)

Prior to the day Mr. Wilbanks killed Peggy Dean, Mr. Beheler had never been involved in, investigated on, or arrested for a crime. (He had been summarily cited for driving under the influence only.) He had no background in police investigative procedures. And, as the state conceded in argument to the jury, he had no understanding that he could be held responsible for the killing committed by Mr. Wilbanks, or that the killing would be deemed first degree murder under the felony-murder rule.

Mr. Beheler indicated he would go with the officers in their car to the station. Officer Lantz said: "He was willing, yes. It was his desire to bring the investigation to a conclusion as soon as possible." (ART 6.)

It was at this point that the officers drove Mr. Beheler to the sheriff's station in a patrol car and tape recorded their interrogation of him regarding a crime they assumed was murder. Officer Lantz had arrived at the Beheler house at 1:00 a.m. The questioning continued until 2:23 a.m. when Detective Del Ray turned on the tape-recorder for another

forty minutes of interrogation at the station. Once the officers had a complete, albeit unknowing, confession, they allowed Mr. Beheler to leave by his only means of transportation: their sheriff's patrol car. It was then nearly three o'clock in the morning.

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ARGUMENT

THIS IS THE WRONG CASE IN WHICH TO DECIDE THE QUESTION PRESENTED

Petitioner asks this Court to decide whether "Miranda warnings [are] required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, voluntarily comes to the police station, and is allowed to leave without hindrance after a brief taped interview." By this question the State of California asks the Court to decide a much broader proposition than that presented by the very narrow facts of this case.

Mr. Beheler, as a passive aider and abettor, never understood that he was, himself, a suspect. He did not commit the killing and he did not intend the killing. Contrary to the facts of decisional precedent,[3/] law enforcement never informed Mr. Beheler of his own vicarious liability. As a result, the voluntary nature of his acquiesence to an officer's request that he accompany him to the station for questioning is compromised since it is axiomatic that for a confession to be voluntary, it must be knowledgeable.

Of course, the facts of this case are even narrower than the situation in which officers request an individual to come to the station to answer questions without informing the person of his suspect status. Where the uninformed interrogatee is the direct perpetrator of the crime, he appreciates his suspect status on some level even without being told. Lack of this knowledge became critical to Mr. Beheler, a passive aider and abettor, when officers expressly informed him that he was not under arrest and that the stationhouse interrogation was for the purpose of rapidly concluding the investigation. Thus, unknowingly, Mr. Beheler became a suspect who believed

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3. Petitioner points to Oregon v. Mathiason (1977) 429 U.S. 492, 50 L.Ed.2d 714, as decisional precedent. (Petition, pp. 15, 16, 19, 20, 21, 28, 32, 33.)

that his importance to the officers was as a witness or an ally.

The facts herein also involve a person who has never been arrested or even investigated for a crime (contrary to decisional precedent). Those that would fall within this category of interrogatees comprise a very small class indeed. This is not the common factual denominator upon which to decide petitioner's question which addresses only the probable cause qua custody issue.

Moreover, it could be argued (as respondent does) that the quantum of evidence, i.e. "focus" element, has already been decided to be of limited relevance in determining the legal trigger invoking the Miranda admonition. "[N]or is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." (Oregon v. Mathiason, supra, 429 U.S. at 495.)

If the importance of the probable cause threshold issue survives Oregon v. Mathiason, such that the issue must be resolved for all the states, surely that question will appear again in a case which is not distorted by the very limiting and unique facts presented here.

For this and the reasons that follow, the writ should be denied.

A. The Facts Of This Case Disqualify It From Being Simply A Mathiason Offspring Because Mr. Beheler Was Not Informed Of His "Target Status" Under United States v. Washington, Infra

In Mathiason, the defendant arrived at the police station (just two blocks from his home) on his own. "'The officer met defendant in the hallway [at about 5:00 p.m.], shook hands and took him into an office. The defendant was told he was not under arrest. The door was closed. The two

sat across a desk. The police radio in another room could be heard. The officer told defendant he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised that the police believed defendant was involved in the burglary and [falsely stated that] defendant's fingerprints were found at the scene. The defendant sat for a few minutes and then said he had taken the property.'" (Oregon v. Mathiason, supra, 429 U.S. at 493.)

Thus, when Mathiason decided to confess, he had deliberately weighed the fact that the police suspected him of the crime within the less-than-compelling atmosphere created by knowing he was not under arrest. He could reasonably presume the police did not believe they had sufficient evidence to arrest him, and he chose to fill in the gaps. He was fully aware then that he was a suspect and yet he told his story to the police. This element of knowledge critically distinguishes the Mathiason holding from the facts of this case.

Here, the officers did not inform Mr. Beheler of his potential vicarious liability, nor that he was a suspect in the investigation. On the contrary, he was led to believe that he was assisting the officers as a witness to a crime committed by his half-brother. Thus, his confession was unintelligent in that he was unaware of his potential liability or that the officers instead were gathering evidence to use against him. Since such knowledge is a necessary legal ingredient to a "voluntary" confession which results from police questioning, respondent challenges petitioner's conclusion that he "voluntarily" came to the police station, or that he "voluntarily" incriminated himself by responding

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to the interrogation.[4] Mr. Beheler did not do this "voluntarily" because he was unaware of his own potential criminal liability as well as his "target status." (Cf. United States v. Washington (1977) 431 U.S. 181, 52 L.Ed.2d 238, where a "targeted" witness was given full written Miranda warnings and signed a written waiver.)

Unlike Mathiason, Mr. Beheler had no prior experience with the criminal justice system from which to guess at the officers' real investigative goal. In addition, the police testified that he was grief-stricken and crying throughout this period, and that he appeared to be under the influence of alcohol.[5]

Moreover, he was not as free to leave as Mathiason. Mathiason arrived at the station on his own at 5:00 p.m., and his home was but two blocks away. In this case the officers drove Mr. Beheler to the station in a patrol car at two o'clock in the morning, thus rendering him incommunicado once inside the police station. The record does not indicate the distance Mr. Beheler would have had to walk had he chosen to go home without the officers' consent. Nor does the record indicate whether the officers would have permitted him to go if he had withdrawn from the recorded interrogation. Certainly, as petitioner concedes, the officers had probable cause to place him under formal arrest at that time to prevent his departure, unlike Mathiason.

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4. Similarly, Mr. Beheler's statement that he voluntarily came to the station and answered the questions was uninformed as to the legal requisites for voluntariness, and is therefore not relevant.

5. Mr. Beheler reasserts that the decision of the Court of Appeal rests in substantial measure on the prosecution's failure to prove beyond a reasonable doubt that the respondent's acquiescence to transportation for stationhouse interrogation, like his incriminating responses thereto, was involuntary under California's independent state grounds. Respondent's argument in the Opposition to Stay, at pp. 11-17, is incorporated by reference in its entirety herein.

Being told that he was not under arrest is not a common factor in the analysis of the Mathiason and Beheler cases; rather, it graphically illustrates their differences in the critical area of compulsion. To say "You're not under arrest" to one who knows he is a suspect removes the compelling nature of the stationhouse inquiry. To some extent it reassures the known suspect he is free to go rather than answer questions which he can assume are aimed at incriminating him. However, to say "You're not under arrest" to one who is unaware of his own potential criminal liability (not being the perpetrator of the act, nor intending it), and who is unaware of his suspect status in the eyes of the police, increases the compulsion to speak. It furthers the misapprehension of the interrogated. Here, Mr. Beheler preceived himself to be a citizen witness with a civic obligation to assist law-enforcement even at the cost of a family member's freedom. The officers' informing him that he was not under arrest was the functional equivalent of affirmatively communicating: "You are not in jeopardy; you need not concern yourself with your own self-incrimination." Encouraging this misapprehension brings this case under the controlling precedent of Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed.2d 694.

B. This Case Is Directly Controlled By Miranda v. Arizona, supra

Mr. Beheler does not challenge the constitutional authority of the state to introduce the statements he made to officers at his home. These statements were not the product of a stationhouse interrogation. The Miranda Court clearly explained that the compulsion to speak in the isolated setting of the police station is certainly greater than in a suspect's home where his "family and other friends are nearby, their presence lending moral support." (Miranda v. Arizona, supra, at 449.) Indeed, this Court opined that "the compulsion to

speak in the isolated setting of a police station may well be greater than in the courts." (Id., at 461; cf. United States v. Washington, supra.) "The atmosphere [of the investigator's office at the station] suggests the invincibility of the forces of the law." (Id., at 449.)

Mr. Beheler's interrogation is a model of police interrogation techniques. This further underscores the coerced nature of the confession. Detective Ray's decision to transport him from his home to the station was the first step of the process. It transformed the police activity from merely receiving a voluntary statement, to eliciting a taped confession through interrogation at the station. On this point it should be noted that the petitioner omitted a sentence from its quotation from Miranda (Petition, p. 13) which is critical in analyzing this case. The following underlined portion was omitted by petitioner.

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

Petitioner has never denied that the challenged, tape-recorded statements were the product of interrogation. The issue has been whether the interrogation was compelled.

Respondent submits that the taped portion of this confession resulted from adherence to coercive interrogation techniques described in Miranda and held to necessitate warnings. Thus, the first step is isolating the subject, preferably at the station. "[T]he 'principal psychological factor

contributing to a successful interrogation is privacy -- being alone with the person being interrogated.' (citation to police manual omitted). . . ." (Miranda v. Arizona, supra, at 450.) Certainly this was accomplished here. Nothing prevented the sheriffs from tape recording Mr. Beheler's statement while at his home, or even asking him follow-up questions on tape, there.

Secondly, the officers are instructed "from outward appearance to maintain only an interest in confirming certain details." (Id.) Mr. Beheler was informed that this would be the nature of the stationhouse questioning, and it was.

Third, "[t]he officers are instructed to minimize the moral seriousness of the offense to cast blame on the victim or on society." (Id.) The officers here encouraged Mr. Beheler's belief that his half-brother was the one responsible, morally and legally, for the crime. "The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt." (Id., at 451.) Thus, in the police manuals on interrogation, "emphasis has been placed on kindness and stratagems." (Id.)

Finally, "[t]he interrogators sometimes are instructed to induce a confession out of trickery." (Id., at 453.) "[T]he police may resort to deceptive stratagems such as giving false legal advice . . . The police then persuade, trick, or cajole him out of exercising his constitutional rights." (Id., at 455.) Certainly the subject thereafter believes he made his statements voluntarily since "the modern practice of in-custody interrogation is psychologically rather than physically oriented." (Id., at 447.)

As Miranda explained: "The entire thrust of police interrogation [in Escobedo[6/]], as in all the cases today, was

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6. Escobedo v. Illinois (1964) 378 U.S. 478, 12 L.Ed.2d 977.

to put the defendant in such an emotional state as to impair his capacity for rational judgment." (Id., at 465; emphasis added.) The police found Mr. Beheler in just such a state upon their arrival at his home. At the time they requested him to be transported to the station for more in-depth questioning, the officers knew his ability to make a free and rational choice to speak to law enforcement was impaired by his alcohol ingestion (see Townsend v. Sain, 372 U.S. 293 (1963)), by his grief-stricken emotional instability (see Spano v. New York, 360 U.S. 315 (1959)), and by his lack of knowledge regarding principles of vicarious liability and the felony-murder doctrine (see Culombe v. Connecticut, 367 U.S. 568 (1961)). It is well established that "[a]ny questioning by police officers which in fact produces a confession which is not the product of free intellect renders the confession inadmissible. (Townsend v. Sain, supra.)

It was while Mr. Beheler was grief-stricken and noticeably under the influence of alcohol that officers obtained his acquiescence to be transported to the station for interrogation. Surely this decision cannot be deemed voluntary as the product of a free will and rational intellect any more than the unknowing confession he gave at the station in response to the interrogation. When it is considered that the police affirmatively encouraged continued misunderstanding about his criminal liability, while possessing more than sufficient evidence for probable cause to arrest,[7/] there can be no doubt

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7. From the sworn testimony of the investigating officers, it is clear that Officer Lantz had been at the scene of the homicide. (RT 83.) He had interviewed witnesses at the scene. (RT 84.) He was aware of the tinfoil bindles on the ground near the body. (RT 85.) These foil bindles would raise at least a reasonable suspicion in the mind of an experienced officer that hashish was involved. Officer Lantz interviewed Mr. Beheler, both inside Mrs. Picking's house and outside. (RT 87, 98.) He discovered that Mr. Beheler had been present at the time of the shooting. (RT 88.) He also discovered that it was Mr. Beheler's car in which the suspects had driven to the liquor

(footnote continued)

that Mr. Beheler's tape-recorded responses to the station-house interrogation were compelled within the meaning of Miranda v. Arizona, supra.

Miranda specifically held that one who is brought to the station for purposes of investigation, though not under arrest, is entitled to the prophylaxis of warnings, in order to render any pre-arrest statements admissible. In one of the four Miranda cases, Vignera v. New York, No. 760, Michael Vignera was taken to the station for questioning in connection with a robbery. When the detective questioned Vignera, he orally admitted the crime. Later, while still at the station, Mr. Vignera was identified as the robber. It was only then that he was formally arrested. Thereafter, he gave a written confession to the district attorney. However, the admissibility of the pre-arrest statement was challenged. At the trial, the detective testified regarding the pre-arrest oral confession. The Miranda court reversed because "Vignera was not warned of any of his rights before the questioning by the detective and the district attorney.[8/] Thus, he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible." (Miranda v.

(footnote 7 continued)

store. (RT 89.) He already knew that the fatal shot came from inside the car. (PHT 94-95.) Blood was found on the driver's side of the car. (SCT 99.) Lantz also discovered that some of the occupants of the car had hidden the gun in Beheler's back yard. (RT 89.) Moreover, by the time of the tape recorded interrogation, the officers had the names and addresses of the other three participants. (ART 7.)

8. This case is similar to those decided with Miranda in that the challenged, tape-recorded confession was entirely unnecessary to prove Mr. Beheler's criminal liability. The officers had Mr. Beheler's volunteered confession at his home including all of the facts discussed at footnote 7, supra. In addition, the prosecution granted Mr. Chavez, a participating eye-witness to the entire incident, total transactional immunity in exchange for his testimony. As in most cases, therefore, California could have secured its conviction without violating Mr. Beheler's constitutional rights and jeopardizing its verdict.

Arizona, supra, at 494.) This Court would be compelled to distinguish or disapprove of this language in Miranda in order to overturn the opinion of the Court of Appeal in this case. The writ should be denied.

C. Granting The Writ And Overturning The Court of Appeal's Opinion Would Result in Manifest Injustice

As previously explained, the subsequently tried, direct perpetrator of this killing was convicted of voluntary manslaughter with intentional and personal use of a firearm. Yet Mr. Beheler was convicted of assisting the felony-murder Mr. Wilbanks, the perpetrator, was acquitted of committing. This unfair result was not the product of different facts, or different defenses because both men relied on diminished capacity due to voluntary intoxication (then a legal defense in California). However, this disparity resulted by operation of law in two ways.

First, in California, proof of vicarious liability for even a specific intent crime requires the state to establish only that the aider and abettor knew of the perpetrator's criminal intent, and did an act which furthered that intent. The doctrine of diminished capacity, of course, does not affect the mental state of mere knowledge, only specific intent. Since the state is not required to prove specific intent for aiding and abetting liability, the defense of diminished capacity for one so charged is no defense at all. The jury was permitted to find Mr. Beheler guilty of first degree murder even if it found he was too drunk to intend to assist in the crime, not to mention too drunk to intend to permanently deprive the drug seller of her drugs. Since a perpetrator of a robbery in California must be proved to possess the specific intent to permanently deprive the owner of property, Mr. Wilbanks' diminished capacity defense resulted in an acquittal of the robbery and attempted robbery charges.

Secondly, Mr. Beheler, as an aider and abettor, was denied delivery of instructions on lesser offenses included within first degree murder that were delivered in Mr. Wilbanks' trial. Since the theory of the state was felony-murder (a killing occurring in the perpetration of a robbery), Mr. Beheler's jury was given only the choice of guilt on first degree murder or total acquittal. (See Beck v. Alabama (1980) 447 U.S. 625.) However, Mr. Wilbanks' jury was given the instructions on mitigated intentional homicide because the killing appeared to be intentional and the diminished capacity defense was invoked.

The facts of Mr. Beheler's and Mr. Wilbanks' defenses were virtually identical, except that by all accounts Mr. Beheler was more influenced by the alcohol. Mr. Wilbanks, the actual killer, received additional benefits by operation of law. As a result, he now stands convicted of voluntary manslaughter with an eight (8) year term, while Mr. Beheler is serving a term of life without possibility of parole for aiding and abetting a first degree murder that was not committed.

Moreover, but for fate, Mr. Beheler's trial would have followed Mr. Wilbanks' trial and the prosecution would have been limited to charging voluntary manslaughter (non-mutual collateral estoppel is recognized in criminal cases in California (People v. Taylor (1974) 12 Cal.3d 686).)

Additionally, it would be unjust to grant this writ and overturn the lower court's remand for retrial in light of the fact that Mr. Beheler was the investigative tool used to solve this case and to bring in the confessions from the others. Indeed, it was Mr. Chavez, a man with two prior felony arrests who fled the police, yet who was given total transactional immunity for his testimony. Mr. Chavez was immunized for his testimony, notwithstanding the fact that he gave a complete confession on tape just as Mr. Beheler and Mr. Howard did. He

had previously been granted immunity on at least one other felony charge.

Finally, securing Mr. Beheler's conviction of murder and sentence of life imprisonment without possibility of parole, as an aider and abettor to a crime in which the actual killer will serve a maximum term of eight (8) years, violates fundamental notions of proportionate punishment inherent in the Eighth Amendment to the United States Constitution. (Enmund v. Florida (1982) ___ U.S. ___, 73 L.Ed.2d 1140.) Granting this writ and overturning the unpublished opinion of the Court of Appeal would serve only to defeat the ends of justice.

The petition for writ of certiorari should be denied.

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CONCLUSION

This is the wrong case in which to decide the question presented. The facts of this case raise many more facets of custodial interrogation than petitioner would suggest. Resolution of these permutations could absorb substantial judicial resources. And yet underlying each such analysis would remain the uniquely limiting facts of a passive aider and abettor with no awareness of his own potential criminal liability and absolutely no experience with or education in the criminal justice system.

In light of the fact that this unpublished case possesses absolutely no precedential utility to the defense; and in light of the vastly disproportionate punishments imposed on the aider and abettor compared with the perpetrator; and finally, in light of Mr. Beheler's personal efforts to carry out his civic duty as he perceived it following the crime; the only just holding would be to deny the writ, and permit Mr. Beheler to stand retrial to face the charges for which the actual killer was convicted. California has never contended that without the challenged confession it would lack the evidence to confict. Nor could it. This confession was unnecessary to its case. The petition for writ of certiorari should be denied.

DATED: May 23, 1983

Respectfully submitted,

QUIN DENVIR
State Public Defender

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Attorneys for Respondent

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

JULIA CLINE NEWCOMB, being first duly sworn, deposes and says:

That affiant is a citizen of the United States, over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 1107 Ninth Street, Third Floor, Sacramento, California, 95814; that on the 23rd day of May, 1983, affiant, pursuant to rule 28.3 of Rules of the United States Supreme Court, enclosed a true copy of the within RESPONDENT'S BRIEF IN OPPOSITION in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed:

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JULIA CLINE NEWCOMB

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 1983.

NOTARY PUBLIC FOR CALIFORNIA

COPY

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Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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Harris v. Riddle (4th Cir. 1977) 551 F.2d 936	6
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United States v. Mapp (7th Cir. 1977) 561 F.2d 685	8
Standefer v. United States (1980) 447 U.S. 10	10

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REPLY TO RESPONDENT'S OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

RESPONDENT HAS NOT SUSTAINED HIS BURDEN OF SHOWING HIS STATEMENTS WERE INVOLUNTARY

Respondent urges this Court to deny the petition for certiorari because this is the wrong case to decide the question presented. In support of this general

proposition, respondent claims: (1) his case is distinguishable from Mathiason because he was not aware of his "target status" under United States v. Washington (1977) 431 U.S. 181; (2) this case is directly controlled by Miranda v. Arizona (1966) 384 U.S. 436; and (3) overturning the appellate court's decision would cause "manifest injustice."

Petitioner, of course, has no quarrel with Proposition 2. This case is directly controlled by Miranda v. Arizona. Thus, it is a singularly appropriate case in which to decide the question presented. Indeed, respondent's rambling discourse on the meaning of "voluntary" is eloquent evidence of the urgent need for clarification.

Proposition 1 contains the main thrust of respondent's opposition. Its seemingly disparate arguments all swing

around a single fulcrum: the ultimate issue of voluntariness. Reduced to its essentials, respondent's argument is straightforward. Although he went voluntarily to the police station, thought he was acting voluntarily, and said he was acting voluntarily, his actions were not voluntary because he was not aware of the seriousness of his involvement and the police lulled him into a false sense of security by not arresting him. Respondent actually argues the failure to arrest "increases the compulsion to speak." (Opp., p. 10.) This is a creative argument but not a compelling one.

This case involves a noncustodial interrogation. In Miranda, this Court concluded compulsion was inherent in custodial surroundings. The existence of a custodial interrogation settles the question of compulsion. However, when a claim of coercion results from a noncustodial

interview, the claimant must show he was subjected to actual coercion. (See United States v. Alyea (10th Cir. 1980) 636 F.2d 1191, 1193; United States v. Vannelli (8th Cir. 1979) 595 F.2d 402, 406-407.)

Looking at the totality of circumstances surrounding the interrogation in this case, the court will be compelled to reject respondent Beheler's claim that his statements were involuntarily given.

First, appellant argues he did not aid the police "voluntarily" because he was unaware of his own potential criminal liability as well as his "target status."[1/]

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1. The "target status" language appears in United States v. Washington, supra, 431 U.S. 181. In Washington, a grand jury witness argued he should have received "potential defendant warnings." This Court rejected the defendant's claim, holding that target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination. (Id., at p. 189.) The court reiterated the need for a showing of overbearing compulsion as a prerequisite to a Fifth Amendment violation. (Id., at p. 190.)

It is possible that in some situations the fact a suspect is not aware of the offense under investigation would be of concern to the court in evaluating the totality of the circumstances. However, in analogous cases involving the knowing, intelligent, and voluntary waiver of Miranda rights, courts have held the police have no duty, as part of the Miranda warnings, to include a warning about the nature of the crime, the penalty, or the elements of the offense. (Collins v. Brierly (3rd Cir. 1974) 492 F.2d 735, 738.) The courts have consistently rejected the notion that a confession is per se inadmissible unless such information is included in the pre-interrogation litany. (Id., at p. 739.)

A suspect's ignorance of the substantive criminal law and the rules of evidence may make his waiver unintelligent, but Miranda does not require the police to go

beyond the prescribed warnings to make sure the person being questioned understands not only his right to remain silent but also the consequences of his failure to exercise it. (Harris v. Riddle (4th Cir. 1977) 551 F.2d 936, 938.)

> ". . . Miranda does not put upon the police the burden of explaining the rules of evidence and the substantive criminal law. The average interrogating police officer is not capable of it. It surely would have been helpful to Harris to have had a lawyer present to explain to him the felony-murder doctrine and the admissibility of an oral confession. But police officers cannot act as counsel even if the burden were properly theirs, and it is not."

In United States v. Hall (4th Cir. 1968) 396 F.2d 841, the court rejected a defendant's claim he was prevented from making a knowing and intelligent waiver because of his ignorance of the severe penalty which could be imposed for the crime charged. The court said:

> "The test is not whether [the defendant] made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing and that he might then consult with a lawyer if he so desired." (United States v. Hall, supra, 396 F.2d at 846.)

Similarly, the test is not whether Beheler would have made the same decision to aid the police if he had first been given a detailed precis of the possible consequences, but whether the officers compelled him to make the statements. The question is not whether Mr. Beheler acted in his ultimate best interest; the question is whether he was coerced. The answer is no. The record is devoid of any hint of threats, coercion, or compulsion.

Consequently, respondent is forced to argue the police compelled him by the things they did not do. For instance, they told him he was not under arrest. This was

true. He was not under arrest nor was he arrested until several days after the initial interview.

The burden of showing the government is guilty of deception is on respondent. The record must disclose some affirmative misrepresentation to establish the existence of fraud, deceit, or trickery, and the showing must be clear and convincing. (United States v. Tweel (5th Cir. 1977) 550 F.2d 297, 299; United States v. Prudden (5th Cir. 1970) 424 F.2d 1021, 1032-1035.)

A truthful statement is not a misrepresentation and, being truthful cannot be regarded as evidence of coercion. (United States v. Mapp (7th Cir. 1977) 561 F.2d 685, 689.)

Respondent has failed to show any single element of coercion. The interview at issue here was conducted with respondent's full consent and cooperation. Although

respondent may not have been aware of the full legal ramifications of his conduct, he did know he was involved in the attempted robbery of Peggy Dean. He knew she had been killed in the process. He knew he had been involved in serious wrongdoing. He called the police.

Moreover, he was under no physical compulsion of any kind. He was free to leave at any time. He did leave at the conclusion of the interview. His statement was voluntary. The circumstances were by no means equivalent to a custodial interrogation. Therefore, Miranda warnings were not required.

Finally, respondent claims reversal of the court of appeal's opinion would result in manifest injustice. Most of respondent's argument deals with the applicability of nonmutual collateral estoppel to criminal cases. This Court analyzed the issue at

length in Standefer v. United States (1980) 447 U.S. 10, and declined to apply the doctrine in a criminal case, deciding that criminal cases involve competing policy considerations that outweigh the economic concerns undergirding the estoppel doctrine.

That question, however, is not at issue here. The court of appeal relied solely on Miranda in reversing respondent's conviction. Both parties requested rehearing. The Fifth District denied the request for rehearing, but modified its opinion and specified the charges on retrial can be no greater than voluntary manslaughter. Since respondent's liability rested solely on a felony murder theory, this "modification" effectively precludes retrial.

There is a question of manifest injustice here - injustice to the People.

Peggy Dean, the victim in this case, may not have been a model citizen, but

she was the victim of the ultimate violation of personal integrity: she was murdered. She is entitled to hold her assailants accountable for what the law requires.

Respondent's arguments should be rejected. This is the appropriate case in which to end the growing confusion about the meaning and purpose of Miranda. The petition should be granted.

Respectfully submitted,

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